

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAR 17 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

SHAUN JERMAINE BROWN,

Appellant.

)
)
) 2 CA-CR 2008-0167
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
)

) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20070191

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Emily Danies

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Shaun Brown was convicted after a bench trial of transportation of marijuana for sale, in an amount greater than two pounds, and possession of drug paraphernalia. The trial court sentenced him to concurrent, substantially mitigated terms of imprisonment totaling three years. He argues on appeal the court erred when it denied his motion to suppress marijuana found in the trunk of the vehicle he was driving.

¶2 We consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling. *State v. Tarkington*, 218 Ariz. 369, ¶ 2, 187 P.3d 94, 94 (App. 2008). And, “we are oblig[]ed to uphold the trial court's ruling if legally correct for any reason.” *State v. Rogers*, 216 Ariz. 555, ¶ 17, 169 P.3d 651, 655 (App. 2007), *quoting State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). A Gila County Sheriff's sergeant was patrolling a two-lane rural highway and decided to conduct a traffic stop on a vehicle that had been traveling about twelve miles per hour below the posted speed limit.

¶3 Brown was the driver of that vehicle. The officer noticed that Brown's hands trembled as he handed the officer his license and the rental agreement for the rental vehicle. The officer then looked inside the vehicle, which he described as “lived-in,” and saw an air freshener, a bottle of energy pills, a box of caffeine tablets, and a map in the front compartment of the vehicle. A suit jacket and shirt hung in the back seat where the officer also saw two child car seats. The officer stated his intention to give Brown a written warning and asked Brown to step out of his vehicle. Brown explained he was coming from Phoenix

where he had been visiting his aunt. He also told the officer he has two young children who did not accompany him on the trip.

¶4 After issuing the warning, the officer asked if Brown would answer a couple of questions, and Brown agreed. According to the officer, Brown made eye contact and answered “no” to all the officer’s questions about contraband in the vehicle. But when asked whether he had marijuana in the car, Brown broke eye contact, looked down at the ground, and said, “No way.” The officer then asked to search the vehicle and Brown refused, explaining he was in a hurry and needed to get home. The officer informed Brown that he would have a drug-detection canine conduct an exterior sniff of the vehicle. The dog was brought to the car and alerted to the presence of drugs in the trunk. When the officer opened the trunk, he discovered bundles of marijuana totaling 245 pounds. The officer then arrested Brown.

¶5 After a pretrial suppression hearing, the trial court found that the officer had an objective reason to pull Brown’s vehicle over based on his slowing of traffic by traveling under the speed limit. The court then found “the testimony is uncontroverted that the defendant voluntarily remained and answered questions,” implicitly finding the remainder of the encounter was consensual. Accordingly, it denied the motion to suppress.

¶6 Brown argues the trial court erred when it denied the motion to suppress the marijuana found in the trunk of the vehicle. Specifically, he contends the officer did not have reasonable suspicion to detain him after citing him for a traffic violation. We review *de novo* whether an officer had reasonable suspicion to conduct an investigative detention. *State v.*

Fornof, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996). During a routine traffic stop, once an officer has confirmed the driver is entitled to operate the vehicle and has issued any citation, the officer may not further delay or question the driver without either the driver’s consent or reasonable suspicion the driver is engaged in illegal activity. *State v. Teagle*, 217 Ariz. 17, ¶ 22, 170 P.3d 266, 272 (App. 2007).

¶7 The trial court found that, once the traffic stop had been completed, the encounter became consensual, and the record supports this finding in part—until the point when Brown refused to allow the officer to search his vehicle. At that juncture, the state concedes the encounter was transformed from a consensual encounter to an investigative detention.¹ *See id.* ¶ 25 (continued detention of defendant after traffic stop and after he declined request to search additional seizure under Fourth Amendment); *accord United States v. Wood*, 106 F.3d 942, 946, 948 (10th Cir. 1997); *State v. O’Meara*, 198 Ariz. 294,

¹In denying the motion, the court stated, “While it seems clear that had the defendant said he wouldn’t answer questions or attempted to have left, he wouldn’t have been permitted so [sic] and there wouldn’t have been sufficient probable cause to detain him further.” The court’s comments support the finding that once the consensual nature of the encounter had ended, Brown was not free to go. *See Teagle*, 217 Ariz. 17, n.4, 170 P.3d at 272 n.4; *see also United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996) (“[w]hether an encounter is a detention or a consensual encounter depends” not on a police officer’s subjective intention, but on whether the officer’s “conduct would have conveyed to a reasonable person that he or she was not free to decline the officer’s requests or otherwise terminate the encounter”).

¶¶ 4, 7, 9 P.3d 325, 326 (2000). And the court never determined whether reasonable suspicion supported this portion of the encounter between the officer and Brown.²

¶8 The determination of whether the facts based on the events leading up to the detention amount to reasonable suspicion is a mixed question of fact and law that we review de novo. *See Ornelas*, 517 U.S. at 691, 696; *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996). A mixed question of fact and law is one “in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). Because the facts surrounding this portion of the encounter are undisputed, we make the legal determination whether, taken together, those facts rose to the level of reasonable suspicion. *See Ornelas*, 517 U.S. at 696-97; *see also State v. Decker*, 119 Ariz. 195, 196, 580 P.2d 333, 334 (1978) (facts undisputed when police officer’s testimony only evidence presented at suppression hearing).

¶9 Relying on the facts in *Wood*, Brown argues the officer did not have reasonable suspicion to further detain him. Some of the facts in *Wood* are similar to some of those found in this case—namely that the defendant had questionable travel plans, was nervous, and had maps and fast food wrappers in his rental vehicle. 106 F.3d at 944. There, the Tenth

²The law is well established that a dog sniff of a vehicle is not itself a constitutional event. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *see also State v. Paredes*, 167 Ariz. 609, 613, 810 P.2d 607, 611 (1991) (law enforcement officers do not need reasonable suspicion to conduct exterior dog sniff on lawfully detained vehicle).

Circuit found that those factors, combined with the fact that the defendant previously had been convicted of drug-related offenses, were not sufficient to constitute reasonable suspicion for a further investigative detention. *Id.* at 948.

¶10 But here the officer observed more indicia of drug trafficking than the officer in *Wood*. Brown broke eye contact when asked about marijuana, had trembling hands throughout the encounter, and exhibited other signs of nervousness. Furthermore, according to the officer's testimony, Brown's vehicle contained indicia of drug trafficking—air fresheners, stimulant pills, unused clothing in the back seat, a lived-in look, and child seats for children that had not accompanied him on the trip in a vehicle he did not own. Additionally, the officer testified Brown's stay in Phoenix had been unusually short for someone traveling from Kansas, and Brown could not provide the address of the relative with whom he had been visiting.

¶11 Although most of the foregoing facts, viewed separately, could be explained innocently, we must determine whether, taken together “they sufficed to form a particularized and objective basis” for the officer to have detained Brown on the suspicion he was transporting illegal drugs. *Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d at 274, *quoting United States v. Arvizu*, 534 U.S. 266, 277 (2002); *see O’Meara*, 198 Ariz. 294, ¶ 10, 9 P.3d at 327 (court must examine individual factors collectively to determine whether reasonable suspicion exists). And, “[i]n reviewing the totality of the circumstances, we accord deference to a trained law enforcement officer’s ability to distinguish between innocent and suspicious actions.” *Teagle*, 217 Ariz. 17, ¶ 26, 170 P.3d at 273; *accord Brown v. Texas*, 443 U.S. 47,

52 n.2 (1979) (recognizing trained law enforcement officer has ability to perceive meaning in seemingly innocent conduct). Thus, viewing the evidence “from the standpoint of an objectively reasonable police officer,” *Ornelas*, 517 U.S. at 696, we conclude that the totality of the circumstances established a reasonable suspicion that the defendant was transporting illegal drugs, which justified his further detention. *See, e.g., Teagle*, 217 Ariz. 17, ¶¶ 28-29, 170 P.3d at 273-74 (factors present sufficient to establish reasonable suspicion of drug trafficking: unusual travel plans, two mounted cellular telephones, fast food wrappers and containers, luggage and clothing in back seat rather than trunk, defendant’s response he was not aware of anyone putting contraband in vehicle, defendant’s decision to leave vehicle and approach patrol car during second stop, and stop occurred in known drug corridor).³

¶12 Because the trial court’s denial of the motion to suppress was legally correct, we affirm the ruling. Accordingly, Brown’s conviction and sentence are affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge

³Brown does not argue the investigative detention was unreasonable in its scope. *See Teagle*, 217 Ariz. 17, ¶ 30, 170 P.3d at 274.